No. 88-1377.

In the

Supreme Court of the United States.

OCTOBER TERM, 1989.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES,
PETITIONER,
v.
BRIAN ZEBLEY, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief of the Commonwealths of Massachusetts and Pennsylvania, the States of Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New York, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont and Wyoming, and the District of Columbia, *Amici Curiae* in Support of Respondents.

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BRIEF OF THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA, THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT AND WYOMING, AND THE DISTRICT OF COLUMBIA, AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

Amici curiae submit this brief in support of respondents. Amici urge this

Court to affirm the judgment below, which invalidated the Social Security Administration's ("SSA's") policy regarding eligibility of disabled children for Supplemental Security Income ("SSI") benefits.

As this Court has recognized, each state has a "quasi-sovereign interest in the health and well-being - both physical and economic - of its residents in general." Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982). Where the interests of children are concerned, the states' interest is particularly strong; indeed, "[t]here is no more worthy object of the public's concern" than protection and aid for dependent children. Wyman v. James, 400 U.S. 309, 318 (1971).

The states' interest in the welfare of their children is most acute with respect to those whose needs are greatest, and whose families are least able to provide for them, so that they are most dependent on the benefits provided by the various levels of government. As Congress expressly recognized in enacting the Social Security Amendments of 1972, children who are both poor and disabled, and the families of such children, are among the neediest and most disadvantaged. H.R. Rep. No. 231, 92nd Cong., 2nd Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4989, 5133-34. Amici therefore have a strong interest in these children's access to the benefits granted them by federal statute.

In addition to their concern for the welfare of their citizens, the states

have a strong interest in protecting themselves from undue fiscal burdens. Because of their commitment to the welfare of their neediest citizens, the states operate various partially or wholly state-funded health and welfare programs, to which applicants rejected from federally-funded programs may turn for assistance. To the extent that these state-funded programs fill a gap in federal coverage caused by unlawful rejections, the federal administrative policies that cause those rejections have the effect of shifting costs from the federal level to the states.[1/]

1/ The policy challenged in this case may be seen as part of a larger effort to shift costs of welfare programs from the federal government to the states. Although some of these efforts have been upheld, see, e.g., Lukhard v. Reed, 481 U.S. 368 (1987) (plurality) (upholding

(footnote continued)

Such cost-shifting subverts the will of Congress, to the detriment of both the states themselves and their neediest citizens. Amici have strong interests

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(footnote continued)

restrictive application of statutory change in income standard for Aid to Families with Dependent Children); Lyng v. Castillo, 477 U.S. 635 (1986) (upholding statutory change restricting Food Stamp eligibility), many have been overturned, either by court decision or by legislative enactment. See, e.g., DeLeon v. Secretary of Health and Human Services, 734 F.2d 930 (2d Cir. 1984) and cases cited at 937 (restricting or invalidating Social Security Administration's Continuing Disability Review program); Act of Sept. 19, 1984, Pub.L. No. 98-460; 1984 U.S. Code Cong. & Ad. News 3046-62 (restricting Continuing Disability Review program and mandating alteration in other Social Security Administration policies). In order to defend themselves against the fiscal impact of such cost-shifting, several states have found it cost-effective to fund programs of legal assistance for persons claiming eligibility for certain federal benefits, e.g., Mass. St. 1989, c. 240, § 2, items 0321-1600 and 0321-2000, allocating funds for that purpose.

in correcting such erroneous administrative policies.

In this case, SSA has adopted an approach to determining disability in children that is so rigid and restrictive as to exclude many children who are severely disabled. The consequences of this policy are devastating to those children and their families, and harmful to the states' interests as well. Amici therefore urge this Court to affirm the judgment below, which invalidated SSA's policy and enjoined its further application.

SUMMARY OF ARGUMENT

I. In enacting the SSI statute, Congress intended to relieve the states of the fiscal burden of caring for the disabled, and to assume that burden at

the federal level. Congress included low-income disabled children in the SSI program in order to provide for the special costs of their care, and to ensure that those costs would not fall to the states (pp. 10 to 14).

By applying an overly restrictive standard for disability determinations for children, SSA has excluded from the SSI program low-income children suffering from severe disabilities. In this manner, SSA has shifted to the states certain costs of the care of such children, and has thereby thwarted the will of Congress (pp. 14 to 16).

Children who are erroneously denied SSI benefits and associated Medicaid coverage often fall back on Aid to Families with Dependent Children ("AFDC"),

or state-funded general assistance and medical assistance programs. Such erroneous denials thus increase the costs of these programs to the states. In addition, such children may receive assistance from various specialized, state-funded health and human services programs, thereby draining the resources that would otherwise be available through those programs for services to others. State and local governments may also bear the costs of health care for such children through subsidies to public hospitals or to private hospital uncompensated care programs. Disabled children who do not receive care may suffer increased life-long dependency on publicly-funded services with consequent costs to the states (pp. 16 to 31).

II. The Court of Appeals correctly ruled that SSA's regulations reflect an erroneous interpretation of the governing statute, and are therefore invalid. In evaluating SSA's policy, the Court need not defer to the agency's interpretation, because congressional intent can be determined through traditional tools of statutory construction. Since SSA's regulations conflict with congressional intent as so determined, they must fall (pp. 31 to 34).

The process of statutory construction must begin with the plain meaning of the statutory terms. Here, the plain terms of the governing statute require that eligibility standards include each child who suffers from any impairment or combination of impairments of comparable

severity to those that would disable an adult. In violation of this statutory requirement, SSA limits eligibility to those children whose impairments meet or equal its listing of impairments, without providing for any individual determination of the functional effects of each child's impairment or combination of impairments. SSA's policy thus conflicts with the plain terms of the statute (pp. 34 to 37).

ARGUMENT

I. THE SOCIAL SECURITY ADMINISTRATION'S UNDULY RESTRICTIVE APPROACH TO SSI ELIGIBILITY DETERMINATIONS FOR CHILDREN SHIFTS TO THE STATES COSTS THAT CONGRESS HAS DECIDED SHOULD BE BORNE AT THE FEDERAL LEVEL.

The SSI program, 42 U.S.C. §§ 1381-1383c (1982), was established by Congress in 1972, to replace earlier state-

administered programs of aid to the elderly, blind and disabled. See Schweiker v. Gray Panthers, 453 U.S. 34, 38 (1981). In replacing state programs with an entirely federally-funded program, Congress indicated its intention to relieve the states of the costs of providing such aid, and assumed that cost at the federal level.

Fiscal relief to the states was no accidental effect of the statute; rather, one of Congress's expressly stated purposes was "to relieve state and local governments of the soaring costs" of existing programs for the disabled. City of New York v. Heckler, 578 F.Supp. 1109, 1121 (E.D. N.Y.), aff'd, 742 F.2d 729 (2d Cir. 1984), aff'd sub nom., Bowen v. City of New York, 476 U.S. 467 (1986), citing legis-

lative history of the 1972 Act. See also Dixon v. Heckler, 589 F.Supp. 1512, 1516 (S.D.N.Y. 1984); Holden v. Heckler, 584 F.Supp. 463, 467, 486 (N.D. Oh.), remanded, 754 F.2d 372 (6th Cir. 1984); Avery v. Heckler, 584 F.Supp. 312, 316 (D. Mass. 1984), aff'd, 762 F.2d 158 (1st Cir. 1985).

As established by Congress, the SSI program provides financial assistance not only to adults disabled from substantial gainful employment, but also to disabled children who live in households with very low income. Congress included low-income disabled children in the SSI program, although they had not been included in earlier disability programs, in recognition of the extraordinarily high cost of their daily care. H.R. Rep. No. 231, 92nd Cong., 2d Sess., re-

printed in 1972 U.S. Code Cong. & Ad. News 4989, 5133-34. For the low-income family of a disabled child, SSI cash benefits can meet the otherwise prohibitive costs of specialized day care, skilled home care, rehabilitation programs, special equipment, and other essential goods and services necessitated by the child's condition.

In addition to cash assistance for such purposes, and even more crucial for many families, SSI coverage in the overwhelming majority of states conveys automatic eligibility for Medicaid, assuring the disabled child's access to urgently needed health care. See 42 U.S.C. § 1396a(a)(10)(A)(i)(II) (1982); see also United States Department of Health and Human Services, Characteristics of State Assistance Pro-

grams for SSI Recipients, (1989), p. 110. For low-income families of children who require frequent and costly medical treatment, the importance of such coverage cannot be overstated. Even the rare low-income family that has access to private health insurance, through employment or otherwise, may depend heavily on SSI-based Medicaid coverage to ensure a disabled child's access to medical care; insurance may leave a significant portion of charges uncovered, may exclude necessary specialized services, or may even exclude the child entirely because of his or her condition.

Despite Congress's expressed intention to guarantee SSI benefits for disabled children, and thereby to relieve

the states of the costs of their care, SSA has adopted a rigid, restrictive approach to eligibility determinations for children that effectively excludes many whose conditions do in fact disable them severely. Although the statute by its terms requires comparable treatment of adults and children in disability determinations, 42 U.S.C. § 1382c(a)(3)(A) (1982), SSA subjects children to a more restrictive standard than adults, requiring only children to demonstrate medical findings that meet or equal those included in its listings of presumptively disabling conditions, and providing no mechanism for evaluating the combined effect of multiple impairing conditions on children.

As a result, large numbers of children whose impairments are comparable to ones that would disable adults from substantial gainful employment are denied SSI benefits, in contravention of the statute. Many of these low-income, disabled children and their families turn to state programs for assistance with the financial burdens arising from their impairments. Thus, through its administrative policy, SSA has circumvented Congress's intention to assume these burdens at the federal level, and has shifted them to the states.

A. Welfare Programs.

1. Aid to Families With Dependent Children.

Erroneous denials of SSI benefits to disabled children impose a wide variety

of direct and indirect burdens on state budgets. The most direct costs appear in welfare programs partially or wholly funded by the states.

Many children who are financially eligible for SSI are members of families who also qualify for Aid to Families with Dependent Children ("AFDC"). See, e.g., "Survey of Disabled Children Under SSI Program", Social Security Bulletin, January, 1980, Vol. 43, No. 1, p. 10.[2/] Approximately half of the funding for AFDC benefits comes from the state. 42 U.S.C. § 603 (1982).

2/ The proportion of SSI eligible families who also qualify for AFDC varies from state to state, because AFDC financial eligibility criteria vary among the states, while SSI financial eligibility is uniform nationwide. 42 U.S.C. §§ 602 (a)(7), 1382 (1982).

The amount paid to a family on AFDC depends on the number of persons in the AFDC assistance unit. Since a child receiving SSI is automatically excluded from the assistance unit, that child's SSI eligibility reduces the size of the unit for AFDC purposes, and consequently reduces the financial burden on the state. 42 U.S.C. § 602(a)(24)(1982).[3/] Conversely, if the child is erroneously excluded from SSI, and

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3/ For example, an AFDC-eligible family with two children would be treated for AFDC purposes as a family with one child if the second child were on SSI. The family would receive the child's SSI benefit, plus an AFDC grant for the other family members. If the second child were denied SSI benefits, however, the family would be treated as having two children and would receive a higher AFDC grant. The increased AFDC grant would not be enough to offset the lost SS. benefit, so both the family and the state would suffer an economic loss.

therefore remains in the AFDC unit, the state's AFDC burden is higher than it would be otherwise be. For the family, however, the denial of SSI coverage outweighs the additional AFDC benefit, since SSI payments are uniformly higher than the incremental AFDC payment for an additional family member.[4/]

4/ In states that supplement SSI payments and that include children among those eligible for such supplements, the cost of AFDC benefits for these children may be at least partially offset by reduced SSI supplements. The fiscal impact on states of such offsets varies widely because of the greatly varying size of, and eligibility requirements for, supplements paid by the states. See United States Dept. of Health and Human Services, Characteristics of State Assistance Programs for SSI Recipients (1989).

2. General Assistance.

Many states also operate general assistance programs that provide both cash benefits and medical assistance to low-income families not eligible for AFDC. E.g., Md. Ann. Code Art. 88A, §§ 65A, 65B; Mass. Gen. Laws ch. 117, §§ 1-25 (1986); Mass. Admin. Code Tit. 106, § 312 (1988).[5/] These programs are operated and funded completely by the states and local governments, with no federal contribution to either the cash benefit or the medical assistance.

In states that do not participate in the AFDC-Unemployed Parent ("AFDC-UP") program, see 42 U.S.C. § 607 (1982), general assistance may be the only welfare program available to children in two-parent families.[6/] Even in states that do have the AFDC-UP program, some families who do not meet the particular requirements of that program may be eligible for general assistance, medical

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5/ As of 1983, at least forty-two states had general assistance programs and at least thirty-four states had medical assistance programs for which children wrongfully denied SSI could qualify. Urban Systems Research and Engineering, Inc., Characteristics of General Assistance Programs 1982 (U.S. Department of Commerce, National Technical Information Service, 1983).

6/ As of 1988, twenty-eight states and other jurisdictions operated AFDC-UP programs; twenty-six did not. United States Department of Health and Human Services, Characteristics of State Plans for AFDC (1988). A modified form of the AFDC-UP program will become mandatory for all jurisdictions as of October 1, 1990. 42 U.S.C. § 607(b), as amended by Act of Oct. 13, 1988, Pub. L. 100-485, Title IV, and Act of Nov. 10, 1988, Pub. L. 100-647, Title VIII.

assistance, or both. See generally Batterton v. Francis, 432 U.S. 416 (1977).

SSI coverage for a disabled child reduces general assistance payments to the child's family by decreasing the amount of general assistance for which the family is eligible. Conversely, improper denials of SSI coverage increase the burdens on general assistance programs, to the states' fiscal detriment.[7/] In states not adopting the Medicaid-Under 21 program, 42 U.S.C. § 1396a(a)(10)(A)(ii) (1982), any medical benefits to these children

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7/ For example, the Massachusetts Department of Public Welfare noted dramatic increases in the number of incapacitated adults receiving General Relief during the years 1981-1983, when the Social Security Administration implemented a nationwide program of reviewing earlier SSI disability determinations.

also are funded solely by the states; those states thus suffer an even greater fiscal drain from improper denials of SSI.[8/]

B. Specialized State-Funded Health Care Programs.

In addition to AFDC and general assistance programs, a wide variety of state-funded health and human service programs bear increased burdens when children are erroneously excluded from

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8/ Improper denials of SSI eligibility to children increase the states' AFDC and general assistance burdens through an additional, less direct mechanism. Without funds for the purchase of services, a disabled child's need for constant, specialized care may prevent a parent from working, thus rendering the entire family dependent on state-funded benefits. For many such families, SSI benefits could make employment -- and economic independence -- possible by funding alternative care for the disabled child.

SSI. In Massachusetts, for example, three programs sponsored by the Department of Public Health ("DPH"), funded solely by the Commonwealth, provide limited quantities of goods or services to children with special medical needs.

The "Home Health Care" program provides intermittent at-home assistance in the care of multiply handicapped children, particularly after surgery or at times of emergency, thus promoting the ability of families to care for their children at home. The "Early Intervention" program provides a variety of specialized rehabilitative therapies, to promote maximum long-term development of children with developmental delay. Under the "Special Medical Needs" program, DPH has provided chronically ill

or physically impaired children with one-time grants of up to five thousand dollars for medical procedures or rehabilitative equipment.

Funds for these and similar programs are limited, however, and services are provided only subject to availability of funds. To the extent that families can use SSI benefits to purchase these services, or that Medicaid reimbursement is available as a result of SSI eligibility, limited state resources can be used for services to other equally needy persons. Conversely, for disabled children who are erroneously denied SSI benefits, such limited state-funded programs may be the only alternative.[9/]

9/ Similarly, state-funded mental health and mental retardation services, respite care, case management, and

(footnote continued)

C. Other Health Care Costs.

Even when disabled children who are erroneously rejected from SSI and corresponding Medicaid coverage do not participate in state-funded programs, the costs of whatever health care they receive ultimately falls, at least in part, upon state and local governments. Children who lack adequate health insurance or Medicaid coverage often rely on public hospitals, which are supported by states and local governments. Even private hospital charges, when left unpaid by a child's family, may ultimately re-

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(footnote continued)

related programs bear undue burdens in serving children who are erroneously excluded from SSI and related Medicaid eligibility.

vert to state-subsidized uncompensated care pools. See, e.g., Mass. Gen. Laws ch. 118F, §§ 15, 17 (Supp. 1988). Through such mechanisms, state funds ultimately fill some of the gap that is created when SSA policy causes chronically ill and disabled children to be excluded from the program that Congress intended to fund their care.10/

10/ State-subsidized insurance or quasi-insurance programs may also assist in paying the costs of health care for these children. For example, the Massachusetts "CommonHealth" program, Mass. Gen. Laws ch. 118E, § 6B (Supp. 1988), provides health benefits to disabled children who are not eligible for SSI. This program is designed for families who are financially ineligible for SSI; the Massachusetts statute incorporates the SSI disability standards. Disability determinations for the program, however, are made separately from SSI determinations. Thus, it is possible that some disabled children who are improperly rejected from SSI may participate in this state-funded program.

These state-funded programs, numerous and costly as they are, do not ensure a disabled child's access to necessary services. Without SSI benefits and associated Medicaid coverage, some children will not receive preventive and rehabilitative services that would promote their development.[11/] Ultimately, for some of these children, such deprivation will result in greater life-long dependency on publicly-funded services, including institutional care, than would otherwise have been necessary. For the

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11/ A New York official has estimated that as many as 25% of the disabled children who may be eligible for SSI in that State are not recipients of any public assistance program at present. These children are unlikely to be receiving timely and adequate medical care and other associated services, which might ameliorate or improve their conditions.

states, that result means vastly increased costs, particularly for mental health and mental retardation services. Similarly, a chronically-ill child's lack of access to preventive health care may lead to increased hospitalization, at least some of the costs of which may fall to a state.

D. Additional Long-Term Costs.

Unduly restrictive SSI policies impose additional, less direct costs on the states. The stress placed on an entire family by a child's chronic illness or disability is obvious and well documented. See generally N. Hobbs, et al., Chronically Ill Children and Their Families, pp. 62-101 (1985). Financial strain due to unreimbursed expenses for medical care or related services adds

substantially to that stress. Id. at 89. The consequences of such stress are high in both human and financial costs. Such consequences include increased family disintegration, mental and physical illness among all family members, homelessness, child abuse, substance abuse, and a variety of other manifestations of family dysfunction. See generally id. Each of these consequences, in turn, may increase demand for various state-funded benefits and services. For an undeterminable number of families, SSI could ease the strain sufficiently to prevent such consequences, and thus to obviate the need for additional state-funded services.

Because Congress intended to place the burden of caring for low-income dis-

abled children on the federal government, the cost of services provided to them and their families through these various types of programs is an unwarranted drain on state budgets. Thus, by adopting an eligibility determination policy that excludes large numbers of severely disabled children, SSA has undermined the legislative purpose and circumvented the will of Congress.

II. THE COURT NEED NOT DEFER TO THE SOCIAL SECURITY ADMINISTRATION'S ERRONEOUS INTERPRETATION OF THE GOVERNING STATUTE.

The Court of Appeals correctly concluded that the regulations at issue are invalid because they are inconsistent with the clear intent of Congress. Zebley v. Bowen, 855 F.2d 67, 73-74, 76

(3d Cir. 1988). Accord Marcus v. Bowen, 696 F. Supp. 364, 382-84 (N.D. Ill. 1988), appeal pending, No. 89-2717 (7th Cir.). Under the circumstances, the Court of Appeals also properly declined to defer to the SSA's contrary interpretation of that statute. 855 F.2d at 72-73. Accord Marcus v. Bowen, 696 F. Supp. at 384.

Whether an agency's regulations exceed statutory authority is a pure question of statutory construction for the court to decide. NLRB v. United Food and Commercial Workers Union, 484 U.S. 112, 105 S. Ct. 413, 421 (1987), relying on INS v. Cardoza-Fonseca, 480 U.S. 421, 446-49 (1987), and Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 and n.9

(1984). In answering that question, the court first tries to determine congressional intent using "traditional tools of statutory construction," namely, the plain language, structure, and history of the statute. NLRB, 484 U.S. at ___, 108 S. Ct. at 421 and cases cited; see INS, 480 U.S. at 449. If a clear congressional intent can be discerned in this manner, then the agency's regulations must be "fully consistent" with Congress's intent. NLRB, 484 U.S. at ____, 108 S. Ct. at 421. It is only where these tools fail to reveal Congress's intent that any deference to the agency's interpretation of the governing statute is appropriate. E.g., Regents of University of California v. Public Employment Relations Board, 485 U.S. 589, ___, 108 S. Ct. 1404, 1412 (1988)

("Because we have been able to ascertain Congress's clear intent based on our analysis of the statutes and their legislative history, we need not address the issue of deference to the agency"); Board of Governors, FRS v. Dimension Financial Corp., 474 U.S. 361, 368 (1986), quoting Chevron, 467 U.S. at 842-43 ("If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'").

The Court of Appeals properly recognized that the starting point for ascertaining Congress's intent is the plain language of the statute itself. 855 F.2d at 73. E.g., American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982).

Since courts must assume that the ordinary meaning of the words used by Congress expresses Congress's intent, that plain language is conclusive unless there is a clearly expressed legislative intention to the contrary. Id. at 68, 72 n.6, 75 and cases cited.[12/] Indeed, this Court often decides cases solely on the basis of the plain language without resort to legislative history. E.g., Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399, ____, 108 S. Ct. 1255, 1258 (1988); Burlington Northern R. Co. v. Oklahoma Tax Commission, 481

12/ See also Rodriguez v. U.S., 480 U.S. 522, 525 (1987); Burlington Northern R. Co. v. Oklahoma Tax Commission, 481 U.S. 454, 461 (1987); Escondido Mut. Water Co. v. LaJolla Band of Mission Indians, 466 U.S. 765, 772 (1984); Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 110, 118 (1983); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570-571 (1982).

U.S. 454, 461 (1987). See also American Tobacco Co., 456 U.S. at 75 ("Going behind the plain language of a statute in search of a possibly contrary congressional intent is a 'step to be taken cautiously,' even under the best of circumstances.").

After comparing the plain language of 42 U.S.C. § 1382c(a)(3)(A) (1982) to the Secretary's regulations, the Court of Appeals properly concluded that,

> in the statutory directive that 'any' impairment may be disabling if severe enough, Congress has clearly expressed an intention that children be given the opportunity for individual evaluations comparable to the residual functional capacity assessment for adults. This intent is contrary to that of the agency, which is to restrict children to listed impairments.

855 F.2d at 76.[13/] There is nothing

13/ The Court of Appeals' conclusion is bolstered by the use of the words

(footnote continued)

in the legislative history which clearly expresses a contrary legislative intent. Indeed, as the Court of Appeals discussed, the legislative history supports the plain meaning of the statute. 855 F.2d at 74-75. Accord Marcus v. Bowen, 696 F. Supp. at 370-71. Accordingly, the Court of Appeal's decision that the Secretary's regulations are invalid should be affirmed.

CONCLUSION

For the reasons set forth herein, this Court should affirm the decision of

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"comparable severity" in 42 U.S.C. § 1382c(a)(3)(A) (1982).

the Court of Appeals for the Third Circuit.

Respectfully submitted,

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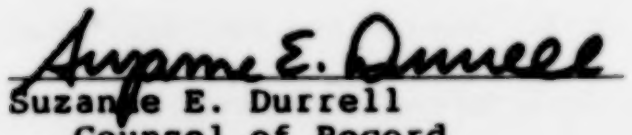

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